No. 12

Brf. of Webb & Drummond for D. E. (on mo.)

Filed Oct. 14, 1898.

Brief of Defendant in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

No. 12. OCTOBER TERM, A. D., 1898.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN ERROR,

vs.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

Brief of Defendant in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

NO. 532. OCTOBER TERM, A. D., 1896.

No. 185. OCTOBER TERM, A. D., 1897.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN ERROR,

vs.

THE SOMERSET RAILWAY.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

STATEMENT.

On the first day of July, A. D, 1871, a corporation was created by and under the laws of the State of Maine, known as the Somerset Railroad Company, authorized to build and maintain a railroad from West Waterville (now Oakland) northerly to Anson, Maine, and on the same day the said Somerset Railroad Company executed a mortgage of all its property to Lewis Pierce et als., Trustees, and to their successors, in joint tenancy; this mortgage embraced the railroad and franchise and all its real and personal property used in connection with the said railroad and all its property to be thereafter acquired. The mortgage was in trust for the benefit of the holders of the bonds of said Somerset Railroad Company issued to an amount not exceeding, in the whole, the sum of $500,000.00, the same payable in twenty years from July 1, A. D. 1871, with interest at the rate of 7 per centum per annum, according to the coupons annexed to the said bonds; and said Somerset Railroad Company on said first of July, 1871, issued and sold its bonds secured by said mortgage to the amount of $450,000, with proper coupons attached; the proceeds of the sale of said bonds were applied to the building and equipping of said railroad. And the said railroad was open to the public and commenced running in the year A. D. 1873.

On April 1st, A. D. 1883, and for a long time prior thereto said Somerset Railroad Company was insolvent and unable to meet its indebtedness as it matured, and its creditors threatened legal proceedings against it, and some creditors had instituted legal proceedings against it; this indebtedness, on July 13, A. D. 1883, was ascertained and determined by the stockholders of the corporation to be:

Floating debt over all assets	$51,435.67
Interest on the same, estimated	36,000.00
Interest due on bonded debt	280,048.76
	$367,484.43
Bonds issued but not then due	450,000.00
	$817,484.43

The said sum of $367,484.43 was due and payable on said 13th day of July, A. D. 1883. Said Company was hindered and delayed in the performance of its duties to an extent that rendered it practically impossible for it to do its current business. The said Pierce and

others, Trustees named in said mortgage, never took possession of said Somerset Railroad Company, and the same remained in the possession of said Somerset Railroad Company until the formation of the present new corporation entitled the Somerset Railway; said Trustees never took any measures to secure a foreclosure of said mortgage for breach of the condition thereof. On the 11th of July, A. D. 1883, there had been a breach of the condition of the mortgage and its bonds to the amount of $450,000 were then outstanding and unpaid but not then due; but there had been a default in the payment of the interest coupons on said bonds, the same having been unpaid for more than three years.

On July 11, A. D. 1883, the holders of said bonds, to an amount exceeding one-half of the same, viz:—to the amount of $351,900, elected to form a new corporation composed of the holders of said bonds, as provided by the statutes of the State of Maine; and on the 15th of August, A. D. 1883, said bondholders did form a new corporation under the name of the *Somerset Railway*. The corporation was organized in the manner provided by the laws of the State of Maine, and adopted a code of by-laws and elected officers. The capital stock of said new corporation, called the Somerset Railway, was $736,648.76, made up as follows: $450,000 outstanding bonds secured by the mortgage, as principal, and $286,648.76 as interest on said bonds, due August 15, A. D. 1883, and then unpaid; and said capital stock was based on the foregoing figures as of August 15, A. D. 1883.

That thereupon said Somerset Railway took possession of the railroad franchise and all the property of said Somerset Railroad Company, and the stockholders of said Somerset Railroad Company voted to surrender possession of its railroad franchise and other property to said Somerset Railway, under its new organization as aforesaid. And by virtue of said votes and the authority of the laws of the State of Maine, said Somerset Railway, on September 1, A. D. 1883, took possession of the railroad and other mortgaged property embraced in the mortgage of July 1, A. D. 1871, and thereafter operated said railroad for the benefit of the Somerset Railway, and has continued so to operate said railway to this day. The amount of its capital stock is $736,648.76 as herein stated and is equal to the amount of the unpaid bonds and overdue coupons secured by said mortgage of A. D. 1871, taken at their face value at the time of the organization of this corporation, to wit: August 15, A. D. 1883; and

the same has been divided into shares of $100 each as required by law; and the officers of said Somerset Railway have issued to the holders of such bonds as have been surrendered to said Somerset Railway, under said reorganization, shares in the capital stock of said Somerset Railway in lieu of the bonds so surrendered, viz: one share of the capital stock of said Somerset Railway for each $100 of said bonds or coupons due August 15, A. D. 1883; that $339,400 of the $450,000 bonds secured by said mortgage of A. D. 1871, have been so surrendered to said Somerset Railway and its capital stock issued in lieu thereof.

The amount of capital stock issued at the time that this suit was instituted in the Supreme Court of the State of Maine was $552,200, and the amount of unconverted bonds at that time was $110,600. The Somerset Railway has repeatedly offered, and still offers, to issue its capital stock aforesaid to all the holders of said bonds still outstanding, as provided by law.

In June, A. D. 1887, the directors of said Somerset Railway were authorized to issue bonds to the amount of $225,000, payable in thirty years from July 1, A. D. 1887, with interest, and thereupon said Somerset Railway issued said bonds and secured the same by a mortgage of its railroad franchise and all its railroad property; and with the proceeds of the sale of said $225,000 of bonds said directors of said Somerset Railway constructed and equipped an extension of its road, under its charter, from the village of North Anson to Bingham village, and said extension is now open to the public and is in full operation by said Somerset Railway and is a part of its railway line, its entire length of road from Oakland to Bingham being forty-two miles.

Said Somerset Railway has also contracted debts and made and issued promissory notes, and now has current liabilities amounting to about $65,000; that it has made, and is still making, extensive improvements and repairs on its railroad.

In 1887, the mortgage given by said Somerset Railroad Company on July 1, A. D. 1871, was foreclosed by a decree of the Supreme Judicial Court of the State of Maine, as provided by law; the final decree therein being made on the 1st day of April, A. D. 1887; and that said judgment of foreclosure has never been reversed or annulled, but remains in full force; and such foreclosure, by the statutes of the State of Maine inures to the benefit of said Somerset Railway.

On the 8th day of July, A. D. 1884, the Somerset Railway claims to have become the sole owner of all the right in equity which said

Somerset Railroad Company, or any parties claiming under it, had of redeeming its mortgaged property from said mortgage of July 1, A. D. 1871, by sheriff's deed of that date, by virtue of sale on execution of said right of redemption; and that the time for redeeming said sale expired without any redemption therefrom, and said Somerset Railway claims to own said right of redemption.

On December 1, 1892, said Lewis Pierce et als., Trustees, under the mortgage of July 1, A. D. 1871, sued out of the Clerk's office in the Supreme Judicial Court in and for the County of Somerset, and also sued out of the Clerk's office of the Supreme Judicial Court in and for the County of Kennebec, a writ of entry (said railroad lying in said counties of Somerset and Kennebec, in the State of Maine,) in the names of said Pierce et als. as Trustees. Said writs of entry were brought against the President, Superintendent, Treasurer, Auditor, Conductors and Station Agents of the said Somerset Railway.

And said plaintiffs claimed in said writs to recover of said defendants, as individuals, the sum of $180,000 as mesne profits.

Under said writs of entry, said plaintiffs claimed that said defendants were disseizors.

The alleged causes of action set out by said Pierce et als. in said respective suits at law pending in said counties of Somerset and Kennebec, arise and flow from said mortgage deed of July 1, A. D. 1871.

After said suits at law had been brought by said Pierce et als., Trustees, against the officers of said Somerset Railway, said Somerset Railway brought a suit in equity in the Supreme Court of the State of Maine. Said case is found in Maine Reports, Vol. 88, p. 86.

As this case and No. 185, Pierce et als. vs. Somerset Railway, are based upon practically the same facts and evidence, and are by agreement argued together [record p. 9] we respectfully ask permission to refer to our brief, in that case offered in support of the motion to dismiss.

E. F. Webb

J. N. Merriman

J. M. Symonds

Attorneys for Defendant in Error.

No. 13.

Brief of Webb & Drummond for D. E. (on mo.)

Brief of Defendants in Error in Support of Motion to Dismiss.

Filed Oct. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1898

No. ~~123~~ 13.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE W. GREELY, FRANKLIN MERRILL, H. A. PURRILL AND D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

Brief of Defendants in Error in Support of Motion to Dismiss.

Supreme Court of the United States.

OCTOBER TERM, A. D., 1896.

No. 185.

LEWIS PIERCE, HERBERT M. HEATH AND FRANKLIN M. DREW, TRUSTEES AND MORTGAGEES, PLAINTIFFS IN ERROR,

vs.

JOHN AYER, WILLIAM M. AYER, A. R. SMALL, HORACE W. GREELY, FRANKLIN MERRILL, H. A. BURRILL AND D. L. FOSTER.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

This is a writ of entry brought under the laws of the State of Maine, to recover possession of a certain railroad called the SOMERSET RAILROAD COMPANY, lying within said State.

The defendants in error are the president, superintendent, treasurer, auditor and conductors of the Somerset Railway, now in possession of the so called Somerset Railroad Company.

The plaintiffs in error are the trustees named in a mortgage deed from the Somerset Railroad Company to said trustees, executed in A. D. 1870.

A further statement of the facts of this case and of the laws referred to seem unnecessary, because a fuller statement of facts and evidence is made in the case of these same plaintiffs in error against the Somerset Railway, said two cases being argued together, and we refer to the statement of facts in the latter case, as it is agreed on page 9 of the record.

The defendants in error claim that the plaintiffs' writ in error should be dismissed, because this Court has no jurisdiction. The record does not show that the plaintiffs in error specially set up or claimed in the State Court any right under the Constitution of the United States.

The pleadings of the plaintiffs in error, and of the defendants, as shown by the record, involve only a construction of the laws of the State of Maine. It does not appear that the attention even of the trial court was called to the fact that the plaintiffs in error, in any form or for any purpose, invoked the protection of the Constitution of the United States. Nor does it appear from the record that any Federal right was "specially" set up or claimed in the Supreme Court of the State of Maine, as required by Sect. 709, Rev. St. The case was not considered by the Supreme Court of the State of Maine with reference to any provision of the Constitution or any law of the United States.

"This Court has no authority to review the final judgment of the highest court of the State in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity, protected by the Constitution of the United States, unless the party against whom such judgment was rendered 'specially set up or claimed' such right under that instrument."

Chicago & North Western Railway Co. vs. Chicago,
164 U. S., 454.

A general statement that the decision of a State Court is against the constitutional rights of the objecting party, . . . or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a Federal question.

Clark vs. McDade, 165 U. S., 168.

"The jurisdiction of this Court to re-examine the final judgment of a State Court cannot arise from inference, but only from averment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

"If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared."

Levey vs. Superior Court of San Francisco, 167 U. S., 175.

On error to a State Court in a chancery case (as also in a case at law), when the facts are found by the court below, this Court is concluded by such finding.

The opinion of the State Court is a part of the record, and it may be examined in order to ascertain the question presented.

Egan vs. Hart, 165 U. S., 188.

The record affirmatively shows that the only legal question at any time mooted was the construction of a State of Maine statute.

It just as clearly appears that no Federal question was either pleaded, raised or presented. (See assignment of errors, p. 226, and opinion of the Supreme Court of Maine.)

For these reasons it is respectfully submitted that the writ of error should be dismissed.

E. F. Webb

J. N. Drummond

Attorneys for Defendants in Error.

Nos 12 & 13.

Add'l Brf. of Webb v Drummond for D. C.

MEMORANDA

Filed Oct. 12, 1878.

TO THE ARGUMENT

FOR

PLAINTIFFS IN ERROR.

So much has been said in relation to the invasion of the "rights of the minority bondholders" that a general statement in relation thereto will aid in understanding the merits of the questions raised.

Upon each of the condition of the mortgage, the rights of the bondholders were to have the mortgage foreclosed for their benefit; and, under the law existing when the mortgage was made, to become a corporation by virtue of the foreclosure.

This corporation was to own the property for the benefit of the bondholders, each of them having such proportion in the capital stock as the amount of his bonds should bear to the whole amount of the bonds issued.

This was the precise right of every bondholder; and all stood upon the same plane.

Allegations, that the acts under which the defendant in error claims, were not for the common benefit of all the bondholders, and to secure to every one his rights as just stated, *are simply not true*. All allegations that in all these proceedings there was any discrimination for or against any bondholder, or class of bondholders, or any attempt to so discriminate, are *contrary to the fact* and the evidence in this case shows that they are so.

The organization of the Somerset Railway, the purchase of the equity of redemption, the foreclosure of the mortgage, the extension of the railroad and the mortgaging of it to obtain the means to build it, were all *in the very nature of things* for the common

benefit of all the bondholders without any discrimination whatever.

Every vote of the bondholders and of the Somerset Railway shows this. After the foreclosure of the mortgage, every bondholder owned his exact share; he could exchange his bond for stock representing precisely what his bond had represented from the beginning and then represented, and on a perfect equality of right, in proportion to his interest, with all the rest. He could have done this at any time and he can do it now; in fact his bond now represents in the Somerset Railway precisely his share of the property and precisely the same share that any other bond of equal amount, by whomsoever held, ever has represented or now represents.

On p. 11, of the brief for the Plaintiffs in Error, a dissenting opinion of two of the Justices of the Supreme Court of Maine is referred to, and what purports to be such an opinion, is printed in that brief, pp. 50 *et seq.* There is no such opinion in the case made up by the Clerk: there is none in the volume of Maine Reports; and moreover, there is no note of any dissent. How the learned counsel can present the document to this court as a dissenting opinion in the State court, we cannot understand.

The case of *Stratton* v. *Railway*, 74 Maine, 422, is cited. But that was a case in which, after the necessary preliminary action by the bondholders, the Trustees had taken possession and were operating the railroad with the powers given to them in such a contingency, by the Statute. It has no application to the case at bar.

Considerable space is devoted by counsel to the foreclosure suit, and various complaints are made: but the mortgagor, the only party in interest was made respondent, and legal service made upon it: eminent counsel appeared generally for it and remained counsel for it to the end; it transpired that they were also counsel for the Town of Anson; they filed a demurrer; upon notice for a hearing on the demurrer, they proposed of their own motion to allow judgment to be entered for the complainants: the intimation that the opposition was withdrawn on account of a change in the Directors is an error; the parties were satisfied that the proceeding was for the benefit of all concerned (case, p.

213): counsel says that the demurrer "was overruled and without an answer or even taking the bill *pro confesso*" the decree was entered: he evidently has forgotten that at that time, judgment on a demurrer was final, except that for good cause shown the court might allow a repleader. 59 Maine 605; 65 Maine 182.

So that, even if the regularity of the proceedings can be inquired into in this case, they are found to be regular, and the judgment a valid judgment as between the parties and their privies, fixing the *status* of the title to the mortgaged property. What the parties understood and expected would be the effect of this foreclosure is best stated in the Statute, then and ever since 1857 existing, (R. S. 1871 ch. 51, sec. 55):

"The foreclosure of the mortgage shall inure to the benefit of all the holders of bonds, coupons and other claims secured thereby; and they, their successors and assigns are constituted a corporation, as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter; and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged. If they neglect or refuse so to convey the court on application in equity may compel them so to do."

Let it be remembered, that when the act of March 11, 1887, was enacted, there had been no dissent of any bondholders to the organization of the Somerset Railway. On the other hand, the parties who had opposed the foreclosure, had accepted the proposed plan of organization, had ceased to press their own suits and were working in accord with the others, upon the assumption that *all the bondholders were members of the Somerset Railway* and that their interests and the interest of that company were precisely indentical. Case, p. 213. At that time no question had been raised by any one that all the bondholders were not members of that Company.

We believe that it sufficiently appears in the evidence in this case, that this question was not raised until after the large majority of the bondholders had exchanged their bonds for stock.

And when the question *was* raised, and the position taken that all the proceedings were void, it was also held by those who raised the question, that the exchange of the bonds for stock paid

the bonds so exchanged, and consequently that the holders of bonds, which had not been exchanged, *held all the property* (including the $225,000 in extension and improvements) *as security for the unexchanged bonds to the exclusion of everybody else.*

Counsel insist that the Supreme Court of Maine decided the questions involved in this case in *Acorn, Petitioner*, 85 Maine 19; that was a petition for the appointment of trustees to fill the vacancies occasioned by the death of two of the trustees under the mortgage of 1871. Such appointment was necessary in order to enable the holders of outstanding bonds to litigate their rights. It was not necessary to decide any other question. The Court said: (p. 87).

"The right of the different bondholders are not now to be distinguished; for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all conflicting claims, suggested by the history of this enterprise, would be premature. We do not now undertake to decide the relative equities between the outstanding bonds and those which were surrendered and cancelled in exchange for the stock of the new corporation, *nor to decide the status of the new organization* and its new issue of bonds."

In the case at bar, all the facts are presented, and the court has now decided those questions which in the former case were expressly left open.

In his argument in support of the assignment of errors, the learned counsel for the Plaintiffs in Error loses sight of the distinction between the rights of trustees holding an estate *coupled with an interest* and the rights of trustees holding the naked title without any interest and without any powers, until called upon by the *cestuis* to act. The decisions cited relates to the former class and do not apply to the latter class. We have already shown that in this case, the trustees are of the latter class with no interest, rights, powers or duties, until the bondholders so decide. In the former case legislation cannot affect the rights of the trustees; in the latter case, as by the contract the majority of the bondholders have plenary powers, *so far as the trustees are concerned*, no *right* of the trustees is affected, by action of the majority of the bondholders, under legislative sanction especially, to produce precisely the same result directly, that they could have produced through the trustees.

To show the utter misconception, as we think, of this case by the counsel for the Plaintiffs in Error, we quote a paragraph from their brief p. 26.

After stating the incorporation of the Somerset Railroad Company and the giving of the mortgage of 1871, they say:

"Twelve years afterwards the State assumed to pass a law by force of which and the proceedings under it, the bondholders who had paid value for their bonds, were required to surrender them and take in their place, not even other bonds of the same corporation at a less rate of interest, and payable at a different time, but stock in a new corporation already encumbered with an issue of bonds for $225,000 thus turning first mortgage bonds, without any foreclosure of the mortgage, into stock of a corporation organized under a subsequent statute in entire disregard of the provision and stipulations of the mortgage contract."

No such statute was passed: one *was* passed authorizing the bondholders, if they should see fit, to form a corporation of *bondholders* not of *stockholders* to do, themselves, *as bondholders*, what they could empower the trustees to do for them, and no more: the statute not only did not "require" them to surrender their bonds for stock but gave them no authority to do so; no "stock" was contemplated or even authorized by the statute.

If, while the bondholders were thus in possession operating the railroad, the mortgage should be foreclosed, *then*, not by the statute of 1883, but by the statute of 1857, their bonds practically became stock.

All that the statute of 1883 authorized was for the bondholders to form a corporation, *as bondholders*, and operate the railroad for their common benefit. There was no "turning of bonds into stock" save by force of the statute existing when the mortgage was made.

When the contingency happened (*i. e.* the foreclosure) by which the bonds were practically "turned into stock" under the old statute, the mortgaged property was unincumbered, and the stock into which each holder's bonds were turned, represented precisely, the same interest that his bonds had represented

Do the necessities of the case for the Plaintiffs in Error require the antedating of the $225,000 mortgage for more than four years? The bonds were *never* turned into "stock in a new corporation

already incumbered with an issue of bonds for $225,000" or any other sum.

We have no occasion to dispute the general principle stated by counsel in relation to the foreclosure nor question the correctness of the decisions, cited in their support. The trouble for the Plaintiffs in Error is, that they do not apply to this case, as already stated:

1. Because at the time this mortgage was made, the law provided for a foreclosure by proceedings in Equity.

2. And if not, the three years right of redempton was a right of the mortgagor, which it could waive and in this case did waive. It will not be disputed that the mortgagor could have released this right by deed, and submitting to a judgment is of equal validity with a deed.

Will it be said that a foreclosure under a subsequent statute in a different form from that existing at the time of the mortgage is not valid, when the mortgagor assents to, and confirms such foreclosure? Is there any more solemn or binding method of assenting to the change of method, than by submitting to a judgment of the Supreme Court of the State based upon that method?

The reply to the argument for the Paintiffs in Error upon all the assignments from the fifth to the ninth inclusive, is, that that argument is based upon an utter misconception of the facts and the statutes upon which the case depends; and, that with the exception of one single point, a restatement of the case is all the reply needed.

The exception is the amazing statement on page 39, that

"Under the mortgage foreclosure, the bondholders become tenants in common of the railroad property, and as many as wish are entitled to become members of the corporation provided for by the mortgage. No one is obliged to become a member *nolens volens*."

There is no "corporation provided for by the mortgage:" we presume the word "mortgage" is a clerical error for "statute." But the statute is to no such effect. It provides absolutely that upon foreclosure of the mortgage the holders of the bonds "are constituted a corporation as of the date of the foreclosure, for all the purposes, with all the rights and powers, duties and obliga-

tions of the original corporation by its charter;" and the trustees must "*convey to such corporation*" all the right, title and interest which they had by the foreclosure thereof."

The mere reading of the statute is a complete answer to the argument and shows that upon foreclosure all the bondholders do become members of the corporation, *nolens volens* and remain so as long as they hold the bonds—and if they part with them, the purchaser takes their place. As *this* statute was in force when the 1871 mortgage was executed, it became a part of the contract.

We desire also to call to the attention of the court, that the statute provides that the trustees shall convey "all the right, title and interest which they had, etc.;" it does not say "the title;" if the trustees have taken possession, they *do* have an interest which must be conveyed by deed; but the title held by these trustees, who are merely the depositary of the naked legal title, may pass by *operation of law.* Such has been the law and practice in Maine, ever since it became a state: in almost numberless instances, the mere title to property used for religious purposes in Maine is taken in the name of trustees, who are not a corporation; their successors are elected annually, and the title vests in these successors by operation of law: and many statutes have been enacted assuming that such trustees have no rights, and that the only persons who have rights are those for whose benefit the property is held; and the Legislature has often upon the request of the beneficiaries authorized some one to convey the property for their benefit. So in this case, the title passes by operation of law, and at the request of those interested the Legislature may intervene without violating any *vested rights.*

Our reply to the argument for the Plaintiffs in Error is:

1. That under the provisions of this mortgage and the peculiar statutes which in law make a part of it, the trustees had no *vested rights* whatever, and, therefore none have been impaired.

2. That the Act of 1883, extending the provisions of the Act of 1878, is an enabling act to be accepted by the bondholders or not, as they should see fit, and, therefore, is not unconstitutional as impairing their rights.

3. That under the powers given by the mortgage and the statutes which make a part of it, the power is given to a majority of the bondholders to speak and act for them all, so far as accepting the privileges conferred by this act is concerned.

4. That the act was accepted by a majority of the bondholders in behalf of them all.

5. But if it shall be held that the assent of all the bondholders must be given, the evidence shows that they did all assent, first by the actual vote of a very large majority (including all but less than $40,000 of the outstanding bonds) and the remainder by *acquiescence for seven years*. It is said that "Silence gives consent:" silent acquiescence for seven years, if ever acquiescence gives assent, is certainly equivalent to actual consent.

6. That the foreclosure was authorized by the statute giving the court equity jurisdiction: and if not, the mortgagor had the power to waive its rights and did waive them, and the foreclosure was binding upon it

7. That as a majority of the bondholders had the right to have a foreclosure through the trustees for the benefit of all, they had the right to accept the waiver of the mortgagor, and the foreclosure, as it was made also for the benefit of all; as well as the purchase of the equity of redemption.

8. That by the foreclosure all the bondholders were "constituted a corporation" with all the powers of the original corporation.

9. That the action of the Somerset Railway was equivalent to an organization of the corporation, and so became the corporation provided for in the statute, of which every bondholder was a member and in which his bonds were the equivalent of stock.

10. That as the trustees had never taken possession nor done any act in that capacity, the title to the property vested in the corporation by operation of law and the statute of 1887, to be held for precisely the same purposes as if the trustees had been the instruments of foreclosure.

11. That the Somerset Railway, composed of all the bondholders, with their bonds practically turned into its stock, the

precise equivalent of the bonds, then owned the railroad free from all incumbrances.

12. That thereafter, that corporation proceeding legally executed the $225,000 mortgage and with the avails of the bonds secured thereby, extended its railroad, of which improvement each stockholder whether by stock or bonds, has the benefit.

13. That, if these views shall not be sustained, yet inasmuch as the Somerset Railway claiming to own the property and being in possession of it, mortgaged the railroad, issued bonds and sold them to the public and expended the proceeds in improving the property, and the holders of the outstanding bonds stood by and without taking any measures to prevent it, saw all this done, they shall not now be permitted to claim this property, except subject to the burden put upon it for the benefit of the property and with their presumed consent.

14. That if it shall be held that the proceedings of the Somerset Railway are void, so far as the foreclosure of the mortgage is concerned, all the bonds are in full force and stand upon the same plane of equity and right, and each one represents its proportionate amount of the mortgaged property, subject to the lien of the $225,000 mortgage put upon it with the consent of all concerned.

The theory of the Plaintiffs in Equity, that the exchange of the bonds for stock in a corporation which they say never existed. *paid those bonds* or deprived them of the security of the mortgage is too abhorrent to law, equity and common sense to require discussion. If any bonds exist as bonds, all that ever were issued, so exist "and are equal before the law."

E. K. Wheeler

Jesse H. Brown

No. 12,413.

Brf. of Webb & Drummond for D.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1898.

Filed Oct. 7, 1898.

No. 12 LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,

vs.

SOMERSET RAILWAY.

No. 13 LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,

vs.

JOHN AYER ET ALS.

BRIEF FOR DEFENDANTS IN ERROR.

EDMUND F. WEBB,
JOSIAH H. DRUMMOND,
JOSEPH W. SYMONDS,
of Counsel for Defendants in Error.

PORTLAND, MAINE:
WILLIAM M. MARKS, PRINTER.
1898.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

No. 184. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
SOMERSET RAILWAY.

No. 185. LEWIS PIERCE ET ALS., Trustees,
Plaintiffs in Error,
vs.
JOHN AYER ET ALS.

These suits, involving the same controversies, are presented to the Court together.

STATEMENT OF THE CASE.

On March 19, A. D. 1860, the Somerset Railroad Company was incorporated by the Legislature of Maine and authorized to build a railroad from Carratunk Falls in Solon to West Waterville, now Oakland.

See brief of Plaintiff in Error, page 54, etc.

The Company was organized under this charter in 1871 and on July 1st of that year it executed a mortgage of all its property to Lewis Pierce et als., trustees, and their successors in joint tenancy.

See Case page 17, etc.

The mortgage was in trust for the benefit of the holders of the bonds of said Company, and authorized an issue of $500,000 of bonds, payable in twenty years from July 1, A. D. 1871, with interest coupons annexed payable semi-annually, and said corporation on said first day of July issued and sold said bonds to the amount of $450,000, the proceeds of which were applied to the building and equipping of said railroad.

The Company built a railroad from Oakland to Norridgewock in 1873; from Norridgewock to Madison in 1874; from Madison to Anson Village in 1876, making in all twenty-five miles of railroad built by the Somerset Railroad Company, which was all of the present railroad that was constructed by the Somerset Railroad Company. The Company operated this line of railroad from Oakland to Anson until September 1, A. D. 1883.

On April 1, A. D. 1883, and for a long time prior thereto, said Somerset Railroad Company was insolvent and unable to meet its indebtedness as it matured. Some creditors had commenced legal proceedings and others had threatened them. On July 13, A. D. 1883, the indebtedness was ascertained and determined by its stockholders at a meeting thereof to be:

Floating debt over all assets,	$ 51,435 67
Interest on the same—estimated,	36,000 00
Interest due on bonded debt,	$280,048 76
	$367,484 43
Bonds issued, but not then due,	450,000 00
Total,	$817,484 43

No coupons of said bonds had then been paid for more than three years, thus creating a breach of the condition of the mortgage.

By the provisions of Chapter 51 of the Revised Statutes of 1871, in force when this mortgage was given, corporations could be formed by the holders of bonds secured by a railroad mortgage in certain cases, as set out in the brief of the Plaintiff in Error, commencing on page 59: Sec. 67, p. 72.

In 1878 (ibid page 70) these provisions were extended to the holders of bonds of such corporations in cases in which the

principal of the bonds should have remained over due for the space of three years, and by an Act approved March 6, A. D. 1883, these provisions were extended as follows:

"SEC. 3. The provisions of Chapter fifty-three of the Laws of one thousand eight hundred and seventy-eight shall apply to cases in which no interest has been paid for more than three years, as well as to cases in which the principal has been over due for more than three years, as herein provided."

Under this provision, the holders of the bonds of the Somerset Railroad Company, following precisely the method provided in the statute, on the 15th day of August, A. D. 1883, formed a new corporation under the name of the Somerset Railway.

Without going into details, the case shows, and the Supreme Court of Maine have found as fact, that in forming this new corporation the bondholders proceeded in exact accordance with the statutes of the State.

The capital stock of the new corporation, called the Somerset Railway, was $736,648.76, made up as follows: $450,000 outstanding bonds secured by mortgage as principal; $286,648.76 as interest on said bonds, due August 15, A. D. 1883, and then unpaid, in accordance with the provisions of the statute.

Previously, however, (to wit, July 13, A. D. 1883,) the stockholders of the Somerset Railroad Company at their annual meeting had voted that the mortgage bondholders organize a new corporation under the statutes of the State, and take possession of the railroad, and at the same meeting voted to surrrender possession of said Somerset Railroad Company to the new corporation, to wit, the Somerset Railway, one of the Defendants in Error.

Thereupon the Somerset Railway, on September 1, A. D. 1883, took possession of the railroad from Oakland to Anson, twenty-five miles, and the other property embraced in the mortgage, and have ever since held and operated the same. The capital stock of the Somerset Railway was divided into shares of one hundred dollars each, to the amount of the bonds and over due coupons, as the law provided.

While the holders of a very large majority of the bonds, including some held by the parties in whose interest the Plain-

tiffs in Error are acting, participated in the formation of this corporation, it is admitted that the holders of all the bonds did not so participate—a majority of all the bonds being sufficient under the statute for the regular formation of the corporation.

The statute contemplated that the bonds should be surrendered to the Company and its stock issued therefor, dollar for dollar. The majority of the bonds were so surrendered to the Somerset Railway and are now held by it and stock issued therefor, the amount being at the time this complaint was instituted in the said Court—February 18, 1892—$339,400, and the amount of bonds with the over due coupons thereon not surrendered was $110,600 not counting over due coupons. The Railway has repeatedly offered and still offers to issue its capital stock to all the holders of the bonds as provided by law.

Foreclosure of Mortgage.

When this mortgage was executed, the following was the statute provision, from Chapter 51 of the Revised Statutes of 1871:

"Sec. 70. The Supreme Judicial Court, in addition to the jurisdiction specifically conferred upon it by this chapter, may have jurisdiction, as in equity, of all other matters in dispute arising under the preceding sections relating to the trustees, mortgages, and the redemption and foreclosure of mortgages; but not to take away any rights or remedies that any party has and may elect to enforce at law; and in all proceedings relating to trustees or to mortgages, their foreclosure and redemption, not otherwise provided for herein, the law relating to trusts and mortgages of real estate may be applied."

Said Pierce et als., trustees, under said mortgage, never entered into possession of said Somerset Railroad Company, nor took any measures to secure a foreclosure of said mortgage of July 1, A. D. 1871, for breach of condition thereof. Said property remained in the possession of said Somerset Railroad Company until the formation of the new corporation—the Somerset Railway, one of the defendants in error, as hereinbefore stated.

On March 6, A. D. 1883, the Legislature of Maine enacted the following provision of Statute:

"Sec. 4. Whenever the principal of any scrip or bonds issued by a railroad corporation shall have been due and payable more

than three years, or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or, if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds may commence a suit in equity for the purpose of foreclosing such mortgage, and the court may decree a foreclosure of such mortgage unless the arrears are paid within such time as the court may order."

Chapter 166 of the Laws of 1883.

An examination of the provisions of the statute in relation to the trustees of railroad mortgages, Revised Statutes, Chapter 51, Sections 47 to 52, inclusive, which are not at all modified by the provisions of this mortgage, shows that such trustees merely hold the title *without any interest whatever in the property.* In other words, they are the mere depositaries of the title of the mortgaged property for the benefit of the bondholders. The bondholders may remove them and elect new ones in their stead at pleasure. The trustees (Sec. 49) cannot take possession of the road until the bondholders so vote, and until the bondholders so vote they can do no act whatever as trustees, and when they can act, they are subject to the full control of the bondholders; and the Act of 1883 just quoted was enacted with direct reference to these provisions of the statute.

Under this Section, and in strict accordance with it, a majority of the bondholders, in behalf of themselves and all the others, on April 18, A. D. 1883, brought a bill in equity against the Somerset Railroad Company for a foreclosure of this mortgage, to inure for the benefit of all the bondholders. (See Case, page 81, etc.)

The Somerset Railroad Company appeared and demurred to the bill, but the demurrer was overruled, and the allegations of the bill being found to be true, an interlocutory decree was entered on the third Tuesday of October, A. D. 1884, that upon the defendant's paying the amount of the coupons then over due, as particularly alleged in the bill, on or before the first day of July, 1885, the complainants should take nothing by their bill, but in default of the payment of the coupons, it was ordered and decreed that the defendants do stand absolutely debarred and foreclosed of, and from, all equity of redemption of, in and to

said mortgaged premises; and on the first day of April, A. D. 1887, it appearing that the respondents had paid nothing, a final decree of foreclosure was entered in the case. This judgment remains in full force; no writ of error was brought to this court, and the judgment remains as an absolute judgment of the Supreme Court of the State of Maine.

In the meantime, a creditor of the old corporation, the Somerset Railroad Company, had commenced an action and obtained judgment and execution against it, and complying strictly with all the statutes of Maine relating to the manner, all its right of redemption in the mortgaged property was, on the 8th day of July, A. D. 1884, sold on execution and purchased by the Somerset Railway, and the right of redemption conveyed to it by the sheriff serving the execution. (See Case, page 79, etc.)

Under the laws of Maine, the Somerset Railroad Company had one year to redeem from this sale. It never did redeem, so that on the 8th day of July, A. D. 1885, all its right of redemption ceased, and all its interest in the mortgaged property became the property of the Somerset Railway, which, by Section 2 of Chapter 166 of the Laws of 1883, this corporation had the power to become the purchaser. The section is as follows:

"SEC. 2. Any corporation formed under the provisions of Chapter 51 of the Revised Statutes, and acts additional thereto, by the holders of mortgage bonds are empowered to acquire by purchase the right of redemption under the mortgage securing such bonds."

The Somerset Railway holds or represents a very large majority of $450,000 of bonds originally issued. A large portion of the outstanding minority bonds held by the parties carrying on these suits in the name of Pierce et als., trustees, were represented by the then owners of said bonds at the meeting to organize the Somerset Railway, and at the meeting of its stockholders and directors thereafter held.

Of the $110,600 of the original bonds still outstanding, the holders of $73,700 participated in the organization of the Somerset Railway and the subsequent proceedings. The amount now outstanding that did not participate in such organization, but whether participating in these proceedings or not, does not appear, is $36,900 out of the total issue of $450,000.

The foreclosure of the mortgage, inuring for the benefit of all the bondholders, of course inured for the benefit of the Somerset Railway, which also owned the right of redeeming from the mortgage when it existed, so that the present Somerset Railway holds not only by the foreclosure of the mortgage, by the proceedings above referred to, but also by the purchase of all the rights of the Somerset Railroad Company, the original mortgagor.

Being such owners and so in possession, in 1888 the Somerset Railway built the railroad from North Anson to Embden, an extension of the twenty-five miles of railroad which the Somerset Railroad Company had built from Oakland to North Anson village; and in 1890, it continued the building of said railroad from Embden to Bingham, making in all sixteen miles of the railroad built by said Somerset Railway after it became a corporation, in addition to that previously built by the Somerset Railroad Company. It also built a branch in 1888, about one mile in length, to the Dodlin Quarry, and has operated the whole of the main line and said branch, a part since September 1st, A. D. 1888, and the remainder since 1888 and 1890.

To secure the means of extending said railroad, said Somerset Railway, by due authority of law, issued its corporate bonds on the first day of July, A. D. 1887, to the amount of $225,000, payable in twenty years from their date, and to secure the same mortgaged its entire railroad from Oakland to Bingham, forty-one miles.

Said bonds were all sold by said Somerset Railway in A. D. 1888, and the proceeds were applied in building the road from North Anson village to Bingham village, sixteen miles, and the Dodlin granite quarry branch, one mile, and in additional equipment of its entire line of forty-two miles.

The mortgage given by the Somerset Railroad Company of July 1, A. D. 1871, included the roadbed from Oakland to the terminus of the road in Solon, but said Somerset Railroad Company had only constructed twenty-five miles from Oakland to North Anson village.

The mortgage given by the Somerset Railway in 1887, embraced the railroad actually constructed by the old Company twenty-five miles in length as well as the sixteen miles actually

constructed by the new Company after the foreclosure of the 1871 mortgage.

The giving of this mortgage in 1887 was a matter of public notoriety and well known to the trustees of the original mortgage and all the parties for whom they are now acting, but no objection was made in behalf of any one, but the parties now prosecuting this litigation stood by and saw this mortgage given and the bonds sold to innocent parties, and the money expended in extending the railroad sixteen miles, and it was not until more than five years afterwards, when the railroad had been built and completed and was in operation to Bingham, that these suits at law were commenced.

The litigation in these cases began with two writs of entry, both dated December 3, A. D. 1892, one in Kennebec County, the other in Somerset County; in which these plaintiffs in error were plaintiffs as trustees under said mortgage of July 1, A. D. 1871. The defendants named in said writs were: John Ayer et als., who were respectively the president, superintendent, treasurer, auditor, conductors, and station agents of said Somerset Railway.

The plaintiffs, Pierce et als., trustees, sought to recover the possession of the railroad, roadbed, real estate, depots, fixtures, and rolling stock in the possession of said Ayer et als., defendants in error, and servants of said Somerset Railway; and said plaintiffs also sought to recover mesne profits against said president, superintendent, treasurer, auditor, conductors and station agents, as officers and servants of said Somerset Railway.

Under said writs of entry, the plaintiffs, said Pierce et als., trustees, claimed that the said defendants, the president, superintendent, treasurer, auditor, conductors and station agents of said Somerset Railway, were disseizors.

Inasmuch as said suits at law could but partly litigate the contention between the parties and were inefficient to secure the ends of justice, because there were grounds of equitable relief not equally available at law, said Somerset Railway, one of the defendants in error, in February, A. D. 1893, brought a complaint in equity to the Supreme Judicial Court of the State of Maine, praying the court to take jurisdiction of all matters stated

in said complaint in equity and in said suits at law, and to consider and determine the entire controversy between said parties in one proceeding, and that said Pierce et als., be enjoined from prosecuting said suits at law.

The court did so take jurisdiction of all of said cases and determined all the controversies arising between said parties, as appears in the opinion of the court in

Somerset Railway in Equity v. *Lewis Pierce et als.*, 88 *Me.*, 86.

and in

Lewis Pierce et als. v. *John Ayer et als.*, 88 *Me.*, 100.

and granted a perpetual injunction.

The precise claim in behalf of the parties prosecuting this suit, through the Plaintiffs in Error, was that all the proceedings of the bondholders were, and are void; but yet that the exchanging of their bonds for stock in the Somerset Railway was an *absolute* payment of the bonds so exchanged; and that consequently the parties, who should not exchange their bonds for stock, though holding less than an quarter of the original amount, still hold their bonds and overdue coupons with interest as a debt against the whole property and are entitled to full payment so far as the whole property will go. And they say "the whole property," means not only the railroad as it existed up to 1887, but also the new part of the railroad built with funds derived from the sale of $225,000 in bonds issued by the Somerset Railway in 1887 and secured by a mortgage made by that company!

In other words, they claim, that, while all their bonds originally were a first lien *on less than a quarter of the property in value*, their associate bondholders have so proceeded that while the latter have received nothing, they have given to the former not only the whole property that was actually mortgaged, but also property costing $225,000 in addition.

On the part of the Somerset Railway, it is contended that the foreclosure proceedings are valid, and cut off all the rights of the old Somerset Railroad Company, mortgagor, and that said Somerset Railway, having acquired the right of redemption by purchase on execution, and no redemption from that purchase having been made within the time allowed by law, has acquired

the full title; and that, as the matter stood previously to 1887, the Somerset Railway Company held the title *in form of law*, but that really every bondholder owned an interest in the mortgaged property, according to the amount of the bond which he held. In other words, that the foreclosure of the mortgage inured for the benefit of all the bondholders, and that nothing has been done to give the preference to the outstanding bondholders, which they claim.

The original company was insolvent; all that the bondholders had to look to was the property; and this property was held by the Somerset Railway for the benefit of all the bondholders, proportionally to their interests—a claim that is most certainly in accord with justice and equity.

Later on, for the purpose of adding to the value of the property already in existence, the Somerset Railway, acting still in behalf of all the bondholders, holding that they held the legal title to the property, determined to complete the extension of the road to the original terminus, or near it. To raise money for this purpose, it issued its bonds and secured them by a mortgage of the property by vote of the corporation at a meeting held upon full and ample public notice. While the record shows that there were negative votes upon the proposition to issue the bonds, nothing appears in evidence in this case that any question of the *right* of the Somerset Railway to do so was even suggested. No one protested against the action, but a few assuming that the Company had the power to do what was proposed, voted against it evidently on the ground of expediency. See S. S. Thompson's letter, Case p. 188.

As already stated, upon these facts the Supreme Court of Maine has found in favor of the contention of the Defendant in Error, that by the proceedings of the bondholders the Somerset Railway did acquire a title to the property, and that its action in mortgaging the road to secure funds to complete the extension was valid, and especially that the Plaintiffs in Error, and those who they represent, after participating in the proceedings as they did, and making no objection to their *legality*, are estopped now for setting up any such claim.

ASSIGNMENT OF ERRORS.

Coming now to the various assignment of errors, we find them so complicated that it is difficult to take them up one by one, in the order in which they are presented, but we believe the points made, or intended to be made, can be readily stated:

I. One of the main propositions of the learned counsel for the Plaintiff in Error is, that the foreclosure of the mortgage of 1871 was illegal and void, because made under statutes which were enacted after the date of the mortgage.

1. The first question is, whether, *if this is so*, it is a question in which the Plaintiffs in Error are interested, and which they can raise.

The statutes, giving a right to redeem property from a mortgage, and prescribing methods of foreclosing such right, were enacted for the *benefit of the mortgagor*, which, in this case, was the Somerset Railroad Company. That Company might have released its right of redemption entirely by a voluntary deed, and upon the same ground it could waive any irregularities, and especially it could waive the question of the constitutionality of the statute providing the method of foreclosing the mortgage. That corporation had its day in court, and upon due notice and hearing, the court holding in effect that the statute under which the proceedings were taken was constitutional, decreed as against the Somerset Railroad Company, a foreclosure of this mortgage. The demurrer filed by the then defendant (See Case pp. 189—190) expressly raised the question of the right of the then plaintiffs to maintain the bill, and alleged that it could be maintained only by the trustees, and also raised the question whether the statute was retroactive and would apply to that particular case. By overruling the demurrer, the Court passed upon the very question now raised, and decided then against the contention of the then defendant and entered a decree, as against the Somerset Railroad Company of foreclosure of this mortgage, notwithstanding. From that decree, no appeal was taken, and no writ of error has been brought to this court to reverse that judgment, and the time for bringing such a writ has long since expired.

If anything is settled, it is that such a judgment, although possibly erroneous, is binding upon the parties to it.

What right have these plaintiffs in error to come into court and set up an alleged right of the Somerset Railroad Company, which it has itself expressly and solemnly surrendered by submitting to the judgment of a competent court?

We repeat, that in the question of the constitutionality of the statutes, the Somerset Railroad Company or its privy in estate alone was interested, and that Company is not only estopped by the judgment, but has never shown the least inclination to set up such a right.

2. But the case upon this point is still worse for the Plaintiffs in Error; for all the rights of the Somerset Railroad Company in, and to its railroad have passed by legal conveyance to its privy in estate the Somerset Railway, the Defendant in Error, and we have the ludicrous spectacle of parties coming into court and undertaking to say that this Defendant in Error has been deprived of one of its rights, and calls upon this court to restore it that right, in spite of its own protest!

If any party in the world, save the Somerset Railroad Company, can raise the question of the legality of the foreclosure, as affected by the constitutionality of the statute under which it was made, it is this Defendant in Error, the Somerset Railway, which, instead of asking the court to intervene to pronounce the foreclosure invalid, has from the first set it up as a basis of its title. Whatever view we take of it, we have the spectacle of creditors coming into court and saying that the mortgage which they hold has not been legally foreclosed, on account of the invasion of the constitutional rights of the debtor, who has not only acquiesced in the legality of the foreclosure, but strenuously maintains it!

3. But the foreclosure was entirely valid.

The law existing at the time the mortgage was made, expressly gave to the Supreme Court of Maine the power to foreclose a railroad mortgage, according to the usual proceedings in equity.

Rev. Stat. Ch. 51, *Sec.* 70.

It is true that by a later statute, the bondholders were author-

ized to commence proceedings, instead of having them commenced by the trustees. The Supreme Court of Maine holds that this was a mere change in the form of the remedy and no change of the rights of the parties.

The bondholders were the real parties in interest. By the statutes of Maine, the foreclosure of such a mortgage inures directly for the benefit of all the bondholders, and all the change in the statute was giving the bondholders, themselves, the real principals, the remedy, instead of having them seek it through the trustees.

But the case is argued as if the trustees had rights and interests in the mortgaged property. We have already pointed out that such is not the case. They are mere depositaries of the title, which the bondholders can take from them and vest in others at any time they please, and there is no single act relating to the property that the trustees can perform until so directed by the bondholders, unless we except the power of calling a meeting of the bondholders to see what they will do. They are not really trustees; they are agents, really, whose powers can be taken away at any time, at any rate, upon payment of any sum which may be due them for services. In this case no such claim is made, and the evidence is plenary that at the time of the foreclosure of the mortgage, the trustees had performed no services whatever, and had been called upon to perform no services; so that we say that the change in the method of seeking a foreclosure in equity by the Legislature of Maine, was wholly within its power.

The statute created no breach of the mortgage; its conditions had already been broken, and the bondholders were entitled to have it foreclosed, and the statute relates only to the method of proceeding when a breach of the conditions of the mortgage had taken place, and been continued not less than three years.

As a matter of fact, in this case many of the coupons due in 1871 and 1872 had never been paid, and a breach of the mortgage justifying a foreclosure had existed more than ten years.

Nor was the result of the proceedings by these bondholders one whit different from what the result would have been if the proceedings had been in the name of the trustees. In both cases, by

the statute of the State, existing long prior to the time when the mortgage was given, a foreclosure of it, by any method, inured to the benefit of all the bondholders, of course in proportion to their several holdings.

We believe that it is sound law that a party has no vested right to a particular remedy as against another remedy, especially when both remedies are based upon the same facts, and give the same result. What difference did it make whether this mortgage was foreclosed by the trustees, by direction of the bondholders, and for their benefit, or by the bondholders themselves, for their own benefit? What rights were taken away from any of the bondholders thereby, as alleged in the assignment of errors?

In the one case, a majority of the bondholders order the trustees, their agents, to do a particular thing; in the other, a majority of the bondholders do it themselves; in both instances for the benefit of all. Can it be said that this change is anything more than a change of the remedy, making it, in the language of the Supreme Court of Maine, "more efficient."

The valid foreclosure of a mortgage, as against the parties having the right to redeem, is valid as against everybody.

This proposition is so fully supported by innumerable decisions that the citation of cases seems entirely unnecessary, but the case of *Barnes* v. *Chicago, etc., Railway*, 122 U. S. Sup. Ct. Reports, 1 to 59, has so many points in common with the cases at bar that we shall be pardoned for referring to it.

In that case, the trustee of a subsequent mortgage proceeded to sell under his trust at the request of the required number of bondholders, and at the same request purchased it in himself at the sale, and then conveyed it to a corporation which had been formed by a portion of the holders of the bonds secured by that mortgage.

Thereupon creditors, claiming that the foreclosure was fraudulent as to them, brought a bill in equity to set it aside; the Court found that their allegations were sustained, and made a formal decree that the foreclosure was null and void.

The trustee, assuming that the foreclosure had been absolutely set aside, commenced a bill in equity to take advantage of alleged

frauds and irregularities in the foreclosure of prior mortgages, but the Court held that the decree in the former case must be narrowed according to the allegations of the bill, and held that the foreclosure had been set aside *only so far as the creditors were concerned* and that it was valid for *all other purposes*, and the bill brought by the trustee was dismissed. In other words, it was held that the judgment of foreclosure was valid as against everybody except as to those creditors who brought the bill in the same court to set aside the decree, so far as they were concerned. They did not attempt to impeach it in another case, and the Court proceeded upon the grounds that the foreclosure was valid as against everybody except so far as was otherwise adjudged in a proceeding to open the foreclosure for a particular purpose.

But it was urged in the State Court by the learned counsel for the plaintiffs in error that the foreclosure of this mortgage was void because it cut off the right of redemption which the Somerset Railroad Company was alleged to have for the term of three years. That question was raised by the demurrer in the foreclosure suit, and yet the Court decreed a foreclosure.

It should be observed that even in the case of mortgages of real estate, no statute of Maine expressly gives a right of redemption of three years. The right is given indirectly in prescribing the modes in which a mortgage may be foreclosed. Chapter 90 of the Revised Statutes of 1871 prescribed the methods. The statute first gives three methods of proceeding, when the mortgagee, after breach of condition, desires and can get possession, and the provision is that possession obtained in either of these three modes and continued for the three following years, shall forever foreclose the right of redemption.

Provision is also made for foreclosure without obtaining possession, by two modes, and it is provided that if the premises are not redeemed within three years after publication of the notice of foreclosure prescribed, the right of redemption is barred.

No statute in existence in 1871 expressly gave a right of redemption for three years in case of railroad mortgages. But a method of foreclosure by publication was given with the provision that unless the arrears were paid within three years the mortgage would be foreclosed.

The provision for foreclosure by Proceedings in Equity then follows as already quoted.

In view of the positive terms of this statute giving jurisdiction in equity to foreclose, this objection is manifestly not well taken. The remedies are concurrent, and the remedy in equity given by Section 70 of Chapter 51 above quoted, is cumulative with the ones given in the statute.

It necessarily follows from the giving of the remedy in equity that the statute contemplates that the proceedings shall be in accordance with the usual methods in equity and therefore that a strict foreclosure is authorized.

And such has been the practice in Maine. In 1877, the present Justice of the United States District Court for the District of Maine, commenced a bill in equity in our State Court for the strict foreclosure of a mortgage of a railroad given in 1870, and, while the case was adjusted without proceeding to judgment, the power of the Court to order such a foreclosure was not questioned. But there was a second mortgage of the same railroad, dated November 1, 1871, to secure bonds issued by the corporation. The railroad mortgaged to secure these bonds lay partially in the State of Maine and partially in the State of New Hampshire. A holder of bonds, which had been dishonored by the non-payment of coupons, commenced a bill in equity in the Circuit Court of the United States, in the District of New Hampshire, praying for a strict foreclosure of the mortgage of so much of the railroad as was situated in that State; and immediately after, a bill in equity for a strict foreclosure was filed in the Supreme Court of the State of Maine. Various bondholders intervened in both courts, a number desiring the foreclosure by the United States Court in New Hampshire of the part of the road lying in New Hampshire; others claimed a foreclosure of the whole railroad, and finally, by agreement of parties it is true, though after the case had been argued, a decree was entered by his Honor, Judge GRAY, in the United States Circuit Court for the New Hampshire District, for a foreclosure of the mortgage, unless the mortgagors and those claiming under them, should pay the arrears within six months. The Supreme Court of Maine, in ancillary proceedings, passed the same decree.

The over due interest not having been paid within the six months, decrees of strict foreclosure were ordered by the United States Court in New Hampshire, and the Supreme Court of Maine, covering the whole road, and today the title to the Portland & Ogdensburg Railroad rests upon that decree, and its validity has never been questioned.

II. But it is claimed and vehemently urged that the Somerset Railway was never a legal corporation.

It early became apparent that the management of a railroad by trustees, as such, was not only inconvenient but substantially impracticable. Usually they were selected without the slightest reference to any experience or ability in the practical operation of railroads; so that our statutes, while recognizing the necessity of having trustees to hold the title, and by direction of the bondholders, to do certain acts, have provided for the speedy transfer of the operation of the railroad in such circumstances to a corporation.

As early as 1857, a statute was enacted applying to mortgages then in existence, as well as future mortgages, that the foreclosure of such a mortgage should inure for the benefit of all the bondholders, and the bondholders become as of the day of foreclosure, *ipso facto*, a corporation, to be organized by a choice of officers, and possessing all the powers, privileges, rights and immunities of the original corporation under its charter.

By various statutes between 1857 and 1883, this authority to organize a corporation was extended, first, to the cases of railroads in which the principal of the bonds was over due, and finally, to cases in which the coupons should be over due for more than three years. This statute did not, like the former, declare that upon the happening of such a contingency, the bondholders should be *ipso facto* a corporation, but *authorized the bondholders* to form such a corporation, in order that they might operate the railroad and manage the property by officers chosen by themselves, instead of the cumbrous method of doing so through the trustees. Such a corporation could be formed only by the voluntary action of the bondholders, and upon application of those holding a majority of the bonds issued; and at a meeting called for the purpose, upon full and ample notice, in the method

in which meetings of stockholders of corporations in Maine are almost universally called.

We submit that it was competent for the legislature to authorize the majority of the bondholders to organize a corporation to take possession of the railroad and operate it for the benefit of the bondholders, after the mortgagor had forfeited its rights to such possession.

Referring to Chapter 51, R. S., Secs. 47 to 52, we find that when a breach of the conditions of the mortgage has taken place, the trustee "shall call a meeting of the bondholders," at which meeting "each bondholder present may have one vote for each hundred dollars of bonds held by him;" the bondholders may organize "and determine whether the trustees shall take possession of such road and manage and run it in their behalf:" "*if they so determine*, the trustees shall take possession of such road and all other property covered by the mortgage" with the usual powers to operate it: they were to call annual meetings of the bondholders and report to them, who might instruct them to contract with the directors of the corporation or other competent party to operate the road; and the bondholders could give the trustees "any other instruction they deem advisable; and the trustees shall conform thereto, unless inconsistent with the terms of the trust."

It is manifest that these provisions contemplate action by a majority of the bondholders, at these meetings and in operating and managing the property, the trustees are to obey the instructions of the majority.

The change made by the Statutes of 1878 and 1883, is to substitute for mass meetings of the bondholders to instruct the trustees what to do and how to do it, a corporation formed by the bondholders and composed wholly of them empowered to do just what the bondholders could order their agents, the trustees, to do; no more and no less.

In both cases the majority act for the benefit of the whole; and in both cases, the voice of the majority is the voice of the whole.

In giving this more efficient method for managing the property, what right of any bondholder is invaded?

If the majority of the bondholders see fit to avail themselves of the new method, are they doing anything substantially different from what they could do under the old law?

If not and if the proceedings differ only in *method* from those under the old law, is not the statute authorizing them, a valid one? Do these statutes go any further than to give a new remedy for enforcing the same right with precisely the same result that the old one gave.

In both cases the possession and management of the property are controlled by the bondholders for their own benefit.

There having been a breach of the condition of the mortgage, and the contingency comtemplated by the statute having happened in this case, a meeting was called by the authority of the holders of over $350,000 of the bonds, out of the $450,000 originally issued. At that meeting (See Case, pp. 45, etc.) $354,600 of the bonds were represented, including the holders of over $70,000 of the bonds now outstanding. At that meeting the bondholders voted *by a unanimous vote*, to organize a corporation, as provided by the law, under the name of the "Somerset Railway." By-laws were adopted and directors were chosen, all by unanimous vote, and they were directed to take possession of the railroad on the first day of September then next following, and were authorized to purchase the equity of redemption in the railroad and take a conveyance to the new corporation. Owners of now outstanding bonds were elected directors, and at the following annual meeting in December, were re-elected, all by unanimous vote, and served as such.

That the Somerset Railway was then legally organized as a corporation "goes without saying." Whether any one then objecting, or any one then participating and objecting within a reasonable time afterwards, became a member of that corporation might be a question, if founded in fact; but no one *did* object, and all the bondholders acquiesced therein, and in the Railway's taking possession and managing the property without any objection till years afterwards.

The corporation was organized August 15th, 1883, and, so far as the evidence shows, everybody acquiesced in the organization till 1890, when some who had participated in the organization,

and others who had acquiesced until that time, filed a bill in equity for filling the vacancies in the trustees.

From 1883 until 1887 the Somerset Railway held this property for the benefit of all the former bondholders. The bonds were the capital stock of the Company, and, whether converted into stock or not, represented an interest in the company property.

On the first day of April, 1887, a final decree of foreclosure of the mortgage in the suit for that purpose was entered. The moment that decree was entered, in accordance with the law in existence before the 1871 mortgage was made, the bondholders became *ipso facto* a corporation, which they could organize by a choice of the proper officers, in which each bond with the overdue coupons, represented a proportional part of the capital stock, made up, in amount, of all the bonds and overdue coupons. But the bondholders had already organized a corporation which was then existing. Up to that period there is not a scintilla of evidence that anybody had objected to the formation of the Somerset Railway. It was therefore deemed that the Somerset Railway, as such corporation, received the benefit of the foreclosure of the mortgage, and that all the holders of the bonds on the first day of April, A. D. 1887, by virtue of the law under which the mortgage was made, became *ipso facto* members of that corporation, each one owning the proportionate part of the property which his bond bore to the whole amount.

And the Somerset Railway at a legally called and held meeting, on the eleventh day of May, A. D. 1887, adopted a vote reciting the foreclosure of the mortgage, the purchase of the equity of redeeming the railroad and the superiority of the title under the foreclosure, and the provisions of the statute as to the capital stock, and directing the proper officers to issue the certificates of stock accordingly; thus recognizing and accepting the effect of the foreclosure as fully and completely as if the corporation had been organized *de novo*. The article in the call of the meeting, under which this action was taken, was:

"To take the necessary action to conform the organization of the company to the foreclosure of the mortgage securing the bonds upon which such corporation was formed."

A new code of By-Laws was also adopted: in fact the proceedings were *in substance* an actual new organization of the company in the manner provided by statute for the organization of a corporation by the holders.

It follows that the parties, who had not actually given in their adhesion to the Somerset Railway before that date, became members of the corporation with all their rights in the mortgaged property precisely the same as if the bondholders had gone through the useless form of organizating the corporation over again.

At that date, we repeat, each bondholder practically owned his proportionate share of the whole mortgaged property, unincumbered by any other lien, by owning his proportionate part of the stock, or, which was the same thing, the bonds representing the total mortgage debt.

But if it shall be held that the action of the bondholders in organizing the Somerset Railway did not bind those who did not participate in that action; and that the foreclosure of the mortgage did not constitute the bondholders a corporation as already organized, we submit that those who did not consent by actual participation, have consented *by acquiescence.*

When the original bill in this cause was filed, the holders of $339,400 of the original $450,000 of the bonds had exchanged their bonds for stock in the Somerset Railway [and while of course the case does not show it, others have exchanged since]; the case shows that the holders of $73,700 of the bonds not exchanged, participated in forming the corporation and in its operations afterwards, making a total of $413,100 which have actually given in their adhesion, leaving the holders of only $36,900 which have not *expressly* consented to the formation of Somerset Railway.

As already stated, this corporation held possession of the property in the precise condition in which it received it from the old corporation, so far as other liens are concerned, and operated it for the common behalf from 1883 to 1887.

Also let it be borne in mind that during these four years, the Somerset Railway was operating the mortgaged property, without objection on the part of any one; that annual meetings of its

members (viz., bondholders) were held, at which meetings the officers made the usual reports, new officers elected, and the usual business transacted. At these meetings there was a full representation and at first four, and afterwards three of the Directors annually elected, were then the holders of bonds now outstanding.

During all this time no one made any objection to the legality of the proceedings, but all acquiesced.

At the meeting, of the bondholders (or the Somerset Railway) held May 11, 1887, after voting to conform the organization of the company to the state of things consequent upon the foreclosure of the mortgage and the ownership of the equity of redemption as well, whereby all assumed without question that the Somerset Railway secured the railroad and its appurtenances, the question of completing the railroad to the terminus named in the amended charter was considered, and, without any dissent, the directors were authorized to complete the road from Anson to Bingham.

At the same meeting, a proposition to mortgage the railroad to secure funds to complete the extension was discussed and carried by a vote of 2,600 to 596. Case, p. 60.

A mortgage was prepared to secure bonds to the amount of $225,000, and another meeting was held August 6, 1887, to see if the stockholders would approve and confirm it; and the stockholders so voted by a vote of 2,654 to 605. In the word "stockholders," we include "bondholders," as at that time but few, of any, shares of stock has been issued; and the owners of bonds outstanding when these suits were commenced, appeared and voted. While the holders of $10,000 of the outstanding bonds voted in the affirmative, the holders of $60,500 voted in the negative; of the negative votes, holders of $60,400 had participated in the organization of the Somerset Railway. Case, p. 63.

The holders of these outstanding bonds, who voted in the negative, raised no questions as to the *status* of the Somerset Railway, but voted in the negative on the ground of expediency only; indeed one of them (William H Brown) was then a director and continued to act as such in the issuing of the bonds, the making

of the mortgage and the construction of the extension, and in fact until his death. Case, pp. 76, 68.

No proceedings were taken to prevent this issue of bonds and the execution of the mortgage, and in brief the Directors went on with the business, built the extension in two sections and completed it in 1889, having secured the funds by the sale of the new bonds.

So far as the evidence discloses, *no question as to the validity of the title of the Somerset Railway to the property and its legal right to operate the railroad was ever raised until after the completion of this extension.*

It was not till July 2, 1890, that a Bill in Equity to fill vacancies in the Trustees under the mortgage of 1871 was filed, in behalf of some of the outstanding bondholders.

Assuming for the moment, that only such of the bondholders were members of the Somerset Railway corporation as participated in the proceedings or consented to them afterwards, what stronger evidence of consent could be given than is found in their acquiescence during all these years?

In the case of *Barnes* v. *Chicago, etc. Railroad*, already cited, the effect of a statute enacted after the execution of the mortgage was also considered. In that case after the passage of the enabling statute, the necessary number of bondholders presented a request to the trustee that he proceed to foreclose the mortgage and buy the property for the bondholders. The same was made accordingly, and the property purchased in by him. Thereupon the majority of the bondholders immediately afterwards organized a corporation under the statute to take the title from him, which entered into the possession of the property, and claimed to own it, subject only to the encumbrances of prior liens; and neither the trustee nor any bondholder, so far as the record discloses, ever asserted the contrary until a suit was decided in which the foreclosure was held to be invalid in respect to some creditors. Then, as in this case, holders of outstanding bonds undertook to repudiate the foreclosure and the formation of the new company, but the Court held that the acquiescence of the holders of the bonds was a subsequent consent to the forma-

tion of the corporation and to its claim to hold the title to the property, and they were bound equally with the rest.

The same must be true in the cases at bar.

III. The mortgage of October 15, 1887, to secure the issue of $225,000 in bonds to complete the extension of the railroad is a valid mortgage and is now a first lien on the railroad property.

We have already discussed this proposition, but we desire to call the attention of the court specifically to it.

The mortgage of 1871 purports to embrace the whole railroad between the termini named in the charter, whether the road had been actually "located" to the upper terminus or only to Anson at that time, does not appear in this case, but the extension above Anson was not constructed until after the 1887 mortgage was executed.

Then the Somerset Railway filed an amended location of the extension from Anson to Bingham under an amendment of the charter authorizing an extension from Solon (the original terminus) to Bingham, and *on that location* constructed the railroad. The 1887 mortgage covered the old railroad and the extension built upon the amended location filed by the Somerset Railway.

If our contention, that, on October 15, 1887, the Somerset Railway actually owned the property by the foreclosure of the 1871 mortgage, is sustained this next mortgage of course was valid.

But if the foreclosure of the mortgage was not valid, the Somerset Railway had acquired precisely the same title by the purchase of the right of redemption and the ripening of the title under that purchase; and the same result follows.

But if it shall be held that the outstanding bondholders did not become members of the Somerset Railway, we contend that as that Company, owning the property subject to the 1871 mortgage, and owning over three-quarters of the bonds secured by that mortgage, and claiming to own the property absolutely, made the mortgage in behalf of all the bondholders as a prior lien, and the holders of the outstanding bonds stood by and, without objecting, allowed the railway to mortgage the railroad to raise money to add to the property, and to expend the money so

raised in extending the road, it is too late, after the bonds have been sold and the money expended, to repudiate the burden and claim the benefit. If they had rights, they failed to assert them in season, and by their own *laches* are estopped to set up those rights now.

If a tenant in common, knowing that his cotenant believed he owned the whole title, should stand by and see his cotenant mortgage the property and with the proceeds make improvements on the property, would he be allowed after the money had been so expended, to repudiate the mortgage? Much less would he be allowed to repudiate the mortgage and hold his share of the improvements. And still less would he be allowed, as the holders of the outstanding bonds are endeavoring to do in this case, repudiate the *whole mortgage* and claim not only their share of the property but also the *shares of all their cotenants!*

The mortgagees in interest of this property at the date of the 1887 mortgage, were entitled to hold the property for their debt, each one in proportion to his holdings of bonds. It was understood and assumed by all, that the Somerset Railway held the title for all the bondholders. As we have seen, a meeting of that company was held and a vote adopted *nem. con.* authorizing the directors to construct the extension; at the same meeting it was voted that the whole railroad be mortgaged to obtain the means for that purpose; a majority of the outstanding bonds attended that meeting and voted, some for and some against the mortgage. The opponents of the mortgage acquiesced, and the votes were carried out. There is not a scintilla of evidence in this case, that any one objected to the validity of the proceedings until after the money was raised and *spent for their benefit.*

The Somerset Railway held itself out to the world as a corporation having stock based upon the amount of the original mortgage debt. This was known to all the original mortgagees or bondholders. The Somerset Railway acted upon this theory and by its very organization and course of action made such representation to the world. The minority knew that the majority was in possession through the agency of the Somerset Railway. The minority knew that the Somerset Railway claimed to represent and to act for all. They knew that third parties were mak-

ing large advances of money upon the faith of such action by the majority. They knew that the majority were proceeding upon this understanding with reference to their own rights and interests, as stockholders, and with reference to the rights and interests of the minority as stockholders. The minority could prevent itself from being bound by such action only by an immediate disavowal of the acts of the majority. To be silent was to consent, and the effect of such consent was to simply place the minority in the position which the action of the majority assumed and understood them to occupy, namely, that of stockholders in the new corporation; and whether the new corporation was a legal one, or only a *de facto* one, merely a form assumed without legal authority therefor, still the rights and duties relating to it can be equitably determined and adjusted only by treating it as what it purports to be, a corporation. It held itself out to be a corporation. That is what it assumed to be; that is what the parties who dealt with it understood it to be, and the civil rights and obligations pertaining to it are in equity precisely the same they would have been if the legality of its corporate existence were not questioned.

Upon the faith of the acts of the majority and the silence of the minority, the public have invested in these bonds, which were taken without the least intimation that the minority, which had kept silent, in any manner disputed the binding force of those acts.

Would it not be an actual outrage to allow the minority to reap the benefit by keeping silence when law, equity and honor called upon them to speak, unless they intended "forever after to hold their peace"?

These principles are so well settled that we need not cite cases in their support.

But in the Court below it was argued that whatever may be the case with the original bondholders, the parties in interest in this case having purchased these bonds in the latter part of 1890, and after the acts relied upon to create an estoppel had transpired, are not bound by those acts, because the bonds are "commercial paper" purchased in the market before it was due, and without knowledge of its dishonor.

But this position cannot be sustained, because:

1. The bonds are not "commercial paper" in any correct sense of that term.

2. But the purchasers did have ample notice to put them on inquiry.

The contention is that as the bonds were not due, the mere fact, that the coupons attached were overdue and dishonored, was no notice that the purchaser of the bonds took them subject to the effect of any acts done by any prior holder of them.

This argument certainly could not apply to the overdue coupons—but the holders claim for them the same immunity.

But let us see what these purchasers knew or were bound to know. They knew that the Somerset Railway was in possession of the property claiming title; they knew that no coupons on the bonds had been paid for over fifteen years; they were bound to know the proceedings in the foreclosure suit as they were shown in the records of the court; they were bound to know of the sheriff's deed of the equity of redemption, for it was on record; they were bound to know of the filing of the location of the extension, *by the Somerset Railway*, for that was a matter of public record; they were bound to know of the 1887 mortgage *by the Somerset Railway*, with its covenants of full warranty of title as a first lien on the property, for that too was on public record. And who believes that they did not know of the construction of the extension with the funds raised for that purpose?

If all this was not sufficient to put the purchasers of these bonds on the inquiry which would have shown them the true state of affairs what would be sufficient?

Moreover as they knew or were bound to know all these facts, they must be presumed to have taken the bonds with full acquiescence in the consequences of those facts.

3. But the law relating to commercial paper is controlled by the statute relating to railroad bonds. The *status* given to a railroad bond by Statute *goes with the bond*. Every purchaser of a Maine railroad bond since 1883, is bound to know that a previous holder may have used it in the formation of a corporation and thus changed it from a negotiable instrument to a muni-

ment or evidence of title of an interest in the capital of such corporation. Especially if the coupons have been due for over three years, he is bound to know that such a corporation of the bondholders may have been formed; in this case, the coupons on these very bonds had been overdue for more than fifteen years; and who believes that in a matter of so much public notoriety these purchasers did not have actual knowledge that the Somerset Railway had been so formed?

However, whether they knew it or not, the statute in question limits the negotiability of railroad bonds, and when they are used for the purpose prescribed in it, as already stated they cease to be negotiable bonds and become the equivalent of certificates of stock in the capital of a corporation.

IV. The eighth assignment of errors claims that the mortgage specially provided that "the trustees should be the sole judges in the first instance whether any breach of the conditions of the mortgage had taken place," etc., and therefore that no foreclosure of the mortgage could be made without the determination of this question by the trustees and that a foreclosure of the mortgage without giving effect to that provision impaired the obligation of the mortgage contract.

There is no provision of the mortgage having any such scope or meaning. It provides:

Third. Any omission of said company to pay any of said bonds or coupons as they become due, or to perform any other engagement herein contained to be performed by it, shall constitute a breach of the condition of this deed, and said trustees for the purpose of enabling them to perform any lawful acts, to cause a foreclosure of this mortgage for conditions broken, shall be the sole judges, *prima facie* of said breach of conditions; and said company shall submit without resistance to any act of theirs for such purposes, not being bound by their judgment in a final trial and decision respecting a breach of condition.

Bearing in mind that the trustees are mere machines, with no interest in the property and no power to act until put in motion by the bondholders, the object and scope of the provision is manifest.

"*For the purpose of enabling them to perform any lawful act,*" their decision that there has been a breach of the conditions of the mortgage is binding on the mortgagor.

In other words, after they have been called upon to perform any lawful act, their decision that there has been a breach of the conditions so that they are required to act, is binding for the time being, upon the mortgagor, and they shall not be required to resort to legal proceedings to get possession, or to do whatever act is involved.

The proposition, that there must be a decision of the trustees *in any event*, is not found in the provision; but only the stipulation that when they are called upon to make a decision upon this point "in order to enable *them* to perform any lawful" such decision is binding on the mortgager. In other words, until they have been called upon to act, this provision gives them no power whatever; and if they never are thus called upon, they never have this power.

This provision is usual in mortgages to trustees and its design is well understood.

SUIT AT LAW.

This is a real action by the trustee of a railroad mortgage for possession of so much of the Somerset Railway as lies within Kennebec County. The judgment should be affirmed.

I. Of course if the judgment in the Equity suit is affirmed, affirmance in the suit at Law follows as a matter of course; but there are other defences.

II. The Plaintiffs in Error are not entitled to possession. They are mere holders of the technical title for a specific purpose for the benefit of the bondholders. They have no interest in the property whatever. They can act only as directed and empowered by the bondholders. The only power which they have is to call a meeting of the bondholders and it is only after they have called such a meeting and been directed by a vote of the bondholders at such meeting, that they have any authority whatever to take possession. Sections 47 to 52 of Chapter 51 of the revised statutes of 1871 are a part of this mortgage; and those sections provide the only manner in which they may be entitled to possession. The bondholders are the real owners and

the so-called trustees can interfere with the property only upon the express direction of the owners. It would utterly violate the conditions of the deed, if the trustees should under any circumstances, of their own motion, interfere with the possession or management of the property without the direction of the bondholders. The deed proper and the statutes, which by law are a part of it, clearly show that the trustees hold the title as the mere agents of the bondholders to save the complication which would arise by making the mortgage directly to the bondholders, who still remain the principals without whose direction in the manner provided in the contract, their agents can do nothing.

In *Sawyer* v. *Skowhegan*, 57 Maine, it was held that in "passive trusts," the trustee cannot maintain a real action against the "*cestuis que trustent*": how much less so can they in this case in which the deed of trust and the law expressly provide that they shall not have possession of the property without the absolute direction of the *cestuis que trustent.*

Again, the mortgage provides that until condition broken the mortgagees shall have possession; and under section 67 of Ch. 51 of the Revised Statutes of 1871 (a part of this mortgage) the purchasers of the equity of redemption succeed to all the rights of the original company in all respects and may, therefore, operate the railroad, either as individuals or they may form a new corporation and operate it. So that the Somerset Railway, whether it be a corporation composed of all the bondholders or any part of them, or a mere partnership whose articles of association are the By-Laws which they adopted (128 Mass., 445; 60 Maine, 468;), under its deed of equity of redemption is entitled to possession until breach of condition; if, therefore, there had been no breach of condition when this action was commenced, the Somerset Railway was entitled to possession and the plaintiffs were not, and this action cannot be maintained.

If there had been a breach of condition, the mortgage and statute point out the only method of proceeding; the trustees must call a meeting of the bondholders and be directed to take possession; they would then have the right to take possession and *not till then.*

Even upon the plaintiff's assumption that the Somerset Railway is, and always has been, an absolute non-entity, the same result follows. In that case the Somerset Railroad Company would be entitled to the possession until breach, and after breach until the bondholder should direct the trustees to take possession. But it appears in evidence, and is the undisputable fact, that the defendant, John Ayer, was the last elected president, the defendant W. M. Ayer the last appointed superintendent, and the defendant A. R. Small the last elected and qualified treasurer of the Somerset Railroad Company, and being so, hold over till their successors are elected. They are the proper officers of the company to operate and manage the railroad, and their possession of it is the possession of the Somerset Railroad Company, if the Somerset Railway has no possession. The other defendants are acting under them: it, therefore, follows that as this action could not have been maintained against the Somerset Railroad Company, it cannot be maintained against these defendants.

III. But the Railroad Company had only an *easement* in the real estate mortgaged.

"And the land so taken by the said corporation as lands taken and appropriated for highways."

Charter of Somerset R. R. Co. Sect. 1.

The trustees have no greater interest or title. It is elementary law that a real action cannot be maintained whose interest is a mere easement and not a freehold. The owner of the servient estate may maintain a real action although a third person owns an easement therein. These propositions seems to us so well settled as not to need elaboration or the citation of authorities.

IV. But certain of these defendants have a defence peculiar to themselves respectively.

1. The defendant Burrill seasonably disclaimed by brief statement under the general issue any right, title or interest in the demanded premises, and denied having possession of the demanded premises. (Case, p. 8.)

The evidence shows that he was, when the action was commenced, the station agent of the Maine Central at Oakland; and the station agent of the Somerset Railway and that the station and grounds are the property of, and controlled by, the Maine Central: that Burrill *in the Maine Central office and grounds*, sells tickets for the Somerset Railway. Equity case, pp. 201–3.

And that he manages the freight that comes to or goes from the station. Ditto p. 207.

The question then is whether a man who, upon grounds to which these plaintiffs have no title whatever, sells tickets to passengers going over the railroad, and upon the same grounds manages the receipt and sending out of freight coming and going over the railroad has such a possession of the whole railroad as enables a real action to be maintained against him? He does not own the tickets: he, *of his own authority*, can give no one a license to pass over the railroad, and has no possession actual or constructive. As station master, he also loads and unloads freight in and from the railway cars, *on land of the Maine Central* and collects the money for the freight. It does not appear in this case that he ever sets a foot upon the Railway Company's premises or directs any one else to do so.

But it is a curious proposition that a station agent whose possession is limited in fact and by the authority under which he acts, to the station grounds, nevertheless has such possession of the whole railroad as to make him liable in a real action jointly with others. As judgment in a real action cannot be rendered against one defendant for one parcel of real estate, and against another for another parcel, no judgment can be rendered against one that cannot be rendered against all. While a judgment against all may be rendered for the whole or any part of the demanded premises, a joint possession and disseizin of the same parcel of land or interest therein, must be proved.

2. The other defendants Merrill and Foster have both disclaimed and denied having possession of the property. It appears that they are merely conductors who have no permanent possession of any of the property and no right to possession, save to run a specified train over the railroad.

A real action cannot be maintained against a mere trespasser, unless at least he was actually upon the premises when the action was commenced. It does not appear that either of these defendants were so in possession. It is submitted that the possession of a conductor is not inconsistent with the disclaimers in this case.

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